

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 DUNN & BLACK, P.S.,)
7 Plaintiff,)
8 -VS-) NO. CV-04-0229-LRS
9 THE UNITED STATES OF AMERICA; and)
10 ENVIRONMENTAL RECLAMATION, INC., an) ORDER DENYING MOTION FOR
Idaho corporation; and JOHN DOE) RECONSIDERATION
CORPORATIONS 1-10,)
11 Defendants.)
12 -----)
13 FIDELITY AND DEPOSIT COMPANY OF)
MARYLAND, a Maryland corporation,)
and AMERICAN GUARANTY & LIABILITY)
INSURANCE COMPANY, a New York)
corporation,)
15 Intervenors.)

17 BEFORE THE COURT is Intervenors' Fidelity and Deposit Company of
18 Maryland and American Guaranty & Liability Insurance Company's
19 [Intervenors] Motion for Reconsideration, filed March 11, 2005 (Ct. Rec.
20 79), without oral argument. Defendant United States responded to
21 Intervenors' motion for reconsideration (Ct. Rec. 81) on March 18, 2005.
22 Intervenors ask the court to reconsider its order of February 25, 2005,
23 denying Intervenors' Motion for Declaratory Judgment (Ct. Rec. 78).

DISCUSSION

25 Motions for reconsideration serve a limited function. Under the
26 Federal Rules of Civil Procedure, motions for reconsideration may be made

1 pursuant to Rule 59(e). The major grounds for granting a motion to
2 reconsider a judgment are: (1) intervening change of controlling law; (2)
3 availability of new evidence; and (3) the need to correct clear error or
4 prevent manifest injustice. *School District No. 1J, Multnomah County*
5 *Oregon v. Acands, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993). A motion for
6 reconsideration is not appropriately brought to present arguments already
7 considered by the court. *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th
8 Cir.1985). Plaintiff does not argue that there has been a change of
9 controlling law, or that new evidence is available, but expressly argues
10 that the Court committed error of law or fact and reconsideration is
11 necessary to prevent a manifest injustice. Ct. Rec. 79, page 2.

12 Intervenors state that even if the setoff claim of the United States
13 has priority over the Plaintiff's attorney fee lien claim, case authority
14 and relevant statutes do not support the conclusion that the United
15 States' setoff claim should have priority over Intervenors' claim. *Id.*
16 More particularly, Intervenors argue that because "[t]he United States
17 should be treated no differently than any other similarly situated
18 creditor, the United States should have no right to setoff the tax claims
19 that accrued after the ERI claims had already been assigned to
20 Intervenors under well established common law principles." *Id.*

21 Intervenors assert that once Intervenors completed their performance
22 under the surety bonds, the claims were assigned to them by the operation
23 of law and pursuant to the Indemnity Agreement and the Article 9 security
24 agreement thereby destroying "mutuality." Intervenors argue that they
25 fully performed their obligations under the surety bonds prior to the
26 date that the tax claim against ERI accrued, which provides the basis for

1 Intervenors' claim to the judgment fund of \$450,000. Performance,
2 Intervenors state, results in Intervenors being equitably subrogated to
3 ERI's claims against the United States, which are represented by the
4 judgment fund. Equitable subrogation causes an assignment by operation
5 of law, effectuating the transfer of collateral, including the interest
6 in the causes of action that resulted in the judgment fund in this case,
7 for which no formal assignment or transfer is necessary. From that point
8 forward, Intervenors reason, they were the real parties in interest, not
9 ERI, which became merely a nominal party. In summary, Intervenors state
10 that the United States cannot setoff against a claim that was assigned
11 before the claim for setoff accrued.

12 Intervenors argue that the court concluded the United States should
13 have priority over Plaintiff's attorney fee lien claim and Intervenors'
14 interests based on the application of common law setoff principles. Ct.
15 Rec. 79, at 7-8. To clarify, this court ruled, following analysis of the
16 federal lien priority statute and common law, that the United States
17 prevailed under statutory setoff (31 U.S.C. §3728) alone, not common law
18 setoff. Likewise, Intervenors rely on case law that was decided over
19 twenty years before the current version of §3728 was enacted, which case
20 law discusses common law setoff, not statutory setoff. Ct. Rec. 85, at
21 4 (citing *The Home Indemnity Company v. United States*, 313 F.Supp. 212
22 (W.D.Mo. 1970)).

23 Finally, Intervenors acknowledge that the lawsuit that resulted in the
24 creation of the judgment fund was between ERI and the United States.
25 Intervenors state that the lawsuit was filed without their knowledge.
26 ///

Intervenors argue that ERI only had a right to act in the capacity of a "constructive trustee" on behalf of Intervenors. The court disagrees.

This case involves a judgment that ERI, not Intervenors, obtained against the government through litigation of ERI's claimed damages suffered as a result of the government's alleged wrongful termination. The funds for these damages are not funds that the government would apply towards the cost of completing the job, but rather funds the government would pay to ERI in settlement of its claim for damages against the government for wrongful termination on the Warren Gap Project.

Intervenors did not or perhaps could not intervene in the Court of Claims lawsuit and as such are bound by the judgment entered therein. ERI was the only party suing the United States and the only recipient of the court's award. Under the facts of this case, the court does not find convincing Intervenors' assignment under state law theory nor the lack of mutuality theory raised in this motion. Accordingly,

IT IS ORDERED that Intervenors' Motion for Reconsideration, filed March 11, 2005, Ct. Rec. 79, is **DENIED**.

The District Court Executive is directed to file this ORDER and provide copies to counsel.

DATED this 18th day of April, 2005.

s/Lonny R. Sukoco

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE